

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

EUGENE S. WOLCOTT,

Plaintiff-Appellee,

Vs.

BOBBIE JO MCCARGO WOLCOTT,

Defendant-Appellant.

FROM THE WILLIAMSON
COUNTY CIRCUIT COURT
No. 93-256
THE HONORABLE HENRY
DENMARK BELL, JUDGE
**VACATED IN PART, AND
REMANDED**

C.A. No. 01A01-9603-CV-00096

David W. Garrett of Nashville,
For Appellee

John J. Hollins and Patrick T.
McNally of Nashville, For
Appellant

MEMORANDUM OPINION¹

CRAWFORD, J.

This appeal involves a dispute concerning division of marital

FILED

August 28, 1996

**Cecil W. Crowson
Appellate Court Clerk**

property in a divorce case.

Bobbie Jo McCargo Wolcott (Wife) and Eugene S. Wolcott (Husband) were married on June 5, 1982, and were divorced by final decree of the circuit court entered September 22, 1995. The final decree awarded Wife a divorce on the stipulated ground of inappropriate marital conduct, awarded custody of the minor child to Wife, and granted Husband visitation rights. Husband was ordered to pay child support in the amount of \$735.00 per month and to maintain life insurance to secure the child support payments. The order required Wife to maintain medical insurance for the child. As to the property division, each party was awarded all personal property then in the parties' possession. Each party was held responsible for outstanding indebtedness incurred by that party. Wife was awarded the 1983 Cadillac automobile, and Husband was awarded the 1990 Chevrolet truck and Ford tractor. The court awarded Wife her Bristol Myers retirement account and her Templeton IRA, and awarded Husband the USAA account and the Franklin National Bank account. Husband was also awarded the net proceeds

¹Rule 10 (Court of Appeals). Memorandum Opinion. -- (b) The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

from the sale of the parties' home place, the Holly Hill house, as well as the parties' 1992 tax refund. Wife was awarded the appreciation in the Nunnelly farm, a property owned by a trust.

Wife has appealed and presents the following issues for review:

1. Whether the trial court erred by not enforcing the written agreement between the parties for division of the proceeds of the Holly Hill residence.
2. Whether the trial court erred in classifying the appreciation of trust property, known as the Nunnelly farm, as marital property and charging it to Mrs. Wolcott.
3. Whether the trial court erred in awarding Dr. Wolcott the entire proceeds from the sale of the Holly Hill residence and the 1992 joint federal income tax refund.

Since this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

The weight, faith, and credit to be given to any witnesses' testimony lies in the first instance with the trier of fact. The credibility accorded will be given great weight by the appellate court. *Town of Alamo v. Forcum-James Co.*, 205 Tenn. 478, 483, 327 S.W.2d 47, 49 (1959); *Mays v. Brighton Bank*, 832 S.W.2d 347, 351 (Tenn. App. 1992).

Appellant's first and third issues, which concern the proceeds from the sale of the marital home, will be considered together.

In 1991, the parties purchased the marital home on Holly Hill Drive in Franklin, Tennessee. Wife testified that she paid the down-payment, \$46,000.00, from her separate property. She also asserts that she paid approximately \$12,000.00 on the mortgage indebtedness for the property. Husband, on the other hand, asserts that he spent approximately \$50,000.00 on improvements to the property. After the parties separated, the property, by mutual agreement, was listed for sale. Ann Arnold, the parties' realtor, presented a contract for the sale of the property on April 13, 1993. Also on April 13, 1993, the parties entered into an agreement concerning the disposition of the proceeds from the sale of the house. The agreement provides:

To Whom it May Concern:

We hereby agree to sell our home at 1405 Holly Hill Drive, Franklin, Tennessee on this date. If this contract is

successful, then Gene Wolcott will give Bobbie Jo Wolcott her down payment and escrow amounting to \$51,000.00.

The remaining equity will be divided equally between the owners.

/s/ Eugene S. Wolcott, M.D.
/s/ Bobby Berry Wolcott

Husband testified that at the time the agreement was signed they also discussed that he would be reimbursed for money that he put into the Nunnelly farm property, which was held in a trust. He testified that he believed that the handwritten agreement concerning the Holly Hill property was the full agreement between the parties with regard to the division of marital assets, and that immediately after signing the agreement, he repudiated it because Wife apparently did not share that understanding. Wife testified that she never agreed to reimburse Husband for any money that he put into the Nunnelly farm property. She asserts that the written agreement clearly refers only to the Holly Hill property and does not refer to any other marital property. Wife also testified that Husband repudiated the contract concerning the Holly Hill property the day after it was signed. The testimony establishes that the contract itself was written and witnessed by Fuller and Ann Arnold, the parties' real estate agents, and that on the same day, Ms. Arnold made notes concerning a discussion between the parties about division of their other assets.

The trial court found the Holly Hill agreement unenforceable, and stated in its memorandum opinion:

The most that the cited cases hold is that a comprehensive agreement in contemplation of divorce, made by the parties with respect to property division and alimony is substantial evidence for the divorce court to consider in determining an equitable division. The agreement in question appears to have been a partial agreement as a starting point for a comprehensive agreement settling all of their respective financial rights and interests. Ann Arnold, the real estate agent, thought when she left the parties' home on April 13 that the parties were getting along well and making substantial progress in settling the matters involved. Subsequently, the parties fell into total disagreement and have both now requested this court to exercise its jurisdiction under T.C.A. § 36-4-121.

We must respectfully disagree with the trial court. The agreement concerning the proceeds from the sale of the Holly Hill residence is clear and unambiguous. It was entered into by two adults, and there is no allegation of any fraud or misrepresentation. The parties simply

agreed that the Holly Hill residence would be sold and the proceeds from the sale divided as stated. We see nothing in the agreement which would allow a court to disregard the contract made between these parties. In *Bruce v. Bruce*, the court stated:

A property settlement agreement between a husband and wife is within the category of contracts and is to be looked upon and enforced as an agreement, and is to be construed as other contracts as respects its interpretation, its meaning and effect. Being such the courts are restrained from disregarding and annulling it. And when such contract is submitted to a court of equity for interpretation and enforcement, it must be construed by the rules of interpretation and remedies to be applied as any other contract (citations omitted).

Courts are not “at liberty to annul or change or amend a contract entered into by and between parties capable of contracting simply upon the ground that the judges may be of opinion that a better agreement would or should have been arrived at.” (citations omitted).

Id., 801 S.W.2d 102, 105 (Tenn. App. 1990).

In the instant case, the parties made an agreement concerning the Holly Hill house which, in effect, separated it from the balance of their marital estate, and the agreement should have been enforced by the trial court. Husband’s contradictory opinion as to the meaning of this clear and unambiguous contract is not admissible and should not have been considered by the court. *See Deaver v. J. C. Mahan Motor Co.*, 163 Tenn.429, 43 S.W.2d 199 (1931); *Whelchel Co. v. Ripley Tractor Co.*, 900 S.W.2d 691 (Tenn. App. 1995). None of the proceeds from the sale of the Holly Hill property should have been considered marital property in light of the April 13, 1993 agreement.

Wife also contends, in connection with the third issue, that the trial court erred in awarding Husband the parties’ entire 1992 income tax refund. Although Wife alleges that the tax refund was generated solely by her employment during 1992, the parties’ 1992 tax records are not a part of the record. Moreover, income Wife generated in 1992, and any tax refund that the parties received as a result, falls within the category of “personal property . . . acquired by either or both spouses during the course of the marriage . . .” and thus is “marital property” subject to equitable division. T.C.A. § 36-4-121(B)(1)(A).

The next issue is whether the trial court erred in classifying the appreciation in Wife’s

trust property, the Nunnelly farm, as marital property and charging it to Wife.

Prior to Wife's marriage to Husband, she was married to Walter H. Berry until his death. At the time Wife and Mr. Berry were married, Mr. Berry owned property known as the Nunnelly farm, and while married to Wife, he and Wife established two trusts titled the Walter Berry Irrevocable Trust and the Bobbie Jo Berry Irrevocable Trust. A one-half interest of the Nunnelly farm was placed in each of the trusts, and Wife, along with Robert Gilliam and Conita Gilliam, was named as trustee for both trusts. The ultimate beneficiaries of the trust are Walter Berry's great nieces, the children of Robert and Conita Gilliam. During the marriage of Husband and Wife, the one-half interest of the Nunnelly farm held in the Walter Berry trust was transferred to the Bobbie Jo Berry Trust, and this trust existed at the time of the divorce. At the time of Mr. Berry's death, the farm was appraised at \$167,102.00. At the time of the trial of this case, the house and farm were valued at \$275,000.00. Husband testified that he made many improvements to the Nunnelly farm property with his labor and funds during the parties' marriage. Wife testified, however, that Husband did not spend any substantial funds to improve the Nunnelly farm. Wife testified that she borrowed money from her parents in the amount of \$50,000.00 and used that and trust funds to refurbish the property. She asserts that Husband did not contribute in any way to the appreciation of the farm, and, since the property is held in trust, Wife claims that it cannot be considered as marital property for distribution purposes.

T.C.A. § 36-4-121 (b)(1)(1991) defines marital property as follows:

(B) "Marital property" includes income from, and any increase in value during the marriage, of property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation . . .

(C) As used in this subsection, "substantial contribution" may include, but not be limited to, the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager, together with such other factors as the court having jurisdiction thereof may determine.

Separate property is defined in the code as follows:

(A) All real and personal property owned by a spouse before marriage;

(B) Property acquired in exchange for property acquired before the marriage;

(C) Income from and appreciation of property owned by a spouse

before marriage except when characterized as marital property under subdivision (b)(1); and
(D) Property acquired by a spouse at any time by gift, bequest devise or descent.

T.C.A. § 36-4-121(b)(2). Thus, an increase in the value of one spouse's separate property becomes marital property only if the other spouse substantially contributed toward its "preservation and appreciation" during the marriage. T.C.A. § 36-4-121(b)(1); *Harrison v. Harrison*, 912 S.W.2d 124, 127 (Tenn. 1995).

It appears from the proof that the Nunnelly farm property was beneficially owned by Wife. Such an equitable interest can appreciate. However, the trial court specifically found that the appreciation of the Nunnelly farm property "occurred mostly because of the improvements to the residence on the farm which were mostly paid for by the trust controlled by the wife and by funds borrowed by the wife from her parents." The record reveals conflicting testimony concerning payment for the improvements, and the trial court resolved that conflict by finding that most of the appreciation occurred as a result of Wife's use of personal funds and trust funds. Giving due deference to the trial court's determination of the credibility of the witnesses, we cannot say that the evidence preponderates against the trial court's finding that the appreciation of the property was not due to Husband's efforts. Accordingly, the appreciation in the trust property should have been considered the separate property of Wife and not included in the marital estate for distribution.

In summary, we hold that the Holly Hill property must be distributed to the parties in accordance with the contract freely and voluntarily made by them, and the proceeds shall not be included in the trial court's division of the marital estate. We further hold that any appreciation in value of the Nunnelly farm property shall be considered the separate property of Wife.

In view of our decision, the content of the marital estate as considered by the chancellor has changed. Therefore, that part of the final decree pertaining to the division of marital property is vacated, and the case is remanded to the trial court for further proceedings. Upon remand, the trial court, in making an equitable division, shall consider the separate assets of the parties and the additional factors listed in T.C.A. § 36-4-121 . Costs of appeal are divided one-half to appellant and one-half to appellee.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE